No. 10,362.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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JURISDICTIONAL STATEMENT.

The United States District Court for the Southern District of California has jurisdiction over the appellant and the subject matter of the indictment under Title 50, United States Code, Sec. 311 Appendix.

This Honorable Court has jurisdiction over the appellant under the provisions of Sections 225(a) and (d), Title 28, of the United States Code.

STATEMENT OF THE CASE.

Issues Presented by the Indictment.

The indictment under which appellant was convicted and pursuant to which judgment was entered, charged him with having on or about September 14, 1942, at Los Angeles, California, having heretofore registered under the Selective Training and Service Act of 1940, having been classified in Classification "1-A-O" and so notified and then ordered to report for induction into the Armed Forces of the United States, knowingly, wilfully, unlawfully and feloniously failed and neglected to report as ordered. For indictment in full, see R. 2-3.

STATEMENT OF THE FACTS.

Appellant in his brief, commencing at page 2 thereof, purports to set forth a summary of the evidence introduced at the trial. It is replete with palpably inaccurate statements of fact and is more or less a statement of what defendant's counsel believe the evidence should show. Only such evidence as was established by the defendant or is considered favorable to him has been set forth. In view of the fact that one of the grounds of appeal is that the evidence is insufficient to support the verdict, we will at this point, set forth only a skeleton outline of the evidence and will reserve a more complete statement until insufficiency of the evidence is discussed in connection with Point XI.

Mario Joseph Pacman, registered under the Selective Training and Service Act on October 16, 1940, and in December of the same year, filed a Selective Service Questionnaire setting forth his conscientious objection to military service of a combatant nature. He was classified

as a student in January of 1941 and then deferred as being over the age of 28 until June 25, 1941, at which time he was classified in Classification "I-A." Approximately 13 months after he filed his Selective Service Questionnaire appellant filed a Special Form for Conscientious Objectors indicating his conscientious objection to military service of a combatant nature and advising that he was a member of the California State Guard.

Upon being notified of his "1-A" classification, defendant requested a hearing before the Local Board, which request was granted, and on March 24, 1942, he appeared before the Board asking for a "1-A-O" classification, which the Board gave him, although it believed that he was insincere.

On April 13, 1942, defendant in writing requested the Board to reclassify him in Classification "4-E," which request the Board denied. However, upon rejecting defendant's claim, it advised him that although the appeal period had expired it would honor an appeal to the Appeal Board in the event he desired to perfect one. The defendant took advantage of the Board's offer and on April 18, 1942, appealed to Appeal Board No. 17-A for a "4-E" classification. The Local Board sent the entire Selective Service file to the Appeal Board which referred the matter to the hearing officer who, after consideration, rejected appellant's claim, and on August 20, 1942, the Appeal Board sustained defendant's "1-A-O" classification by unanimous vote of 3-0. He was so notified on August 31, 1942.

On September 2, 1942, defendant appeared at the office of the Local Board at which time he was told by the clerk that he would be sent an Order to Report for Induction

in the near future. Defendant told her that he would not take the call, whereupon he was advised that he must do so and that in the event of his failure to obey the Order, he would be subject to report to the Federal Bureau of Investigation. Defendant replied that he would not go into the Army even if he had to go to prison.

On September 3, 1942, defendant was sent an Order to Report for Induction directing him to appear on September 14, 1942, together with a letter of transmittal signed by the Chairman of the Board, which advised him that a failure to report as ordered would subject him to criminal prosecution.

Defendant freely admitted that he received the Order to Report for Induction as well as the letter of transmittal and that he did not appear at the time and place ordered. Upon his failure to appear he was sent a Notice of Suspected Delinquency.

The evidence further discloses correspondence initiated by the defendant with the State and National Directors of Selective Service in an effort to have them take an appeal on his behalf to the President.

SUMMARY OF ARGUMENT.

In summarizing argument on points raised by appellant, there are two matters which stand out with significance and which by themselves would justify the Court in affirming a conviction:

1. The Record discloses overwhelming evidence of guilt.
2. Only a few of the errors assigned by appellant are properly before the Court and only should those be considered on review.

ARGUMENT.

Appellee will meet appellant's brief point by point but will first answer appellant's Point XI.

POINT XI.

The Evidence Was Sufficient to Support the Verdict of Guilty and the District Court Did Not Err in Entering Judgment Against Appellant.

Counsel argues briefly that the evidence was insufficient to support the verdict of guilty for the reason that no criminal intent was proven.

I.

THE ASSIGNMENT OF ERROR IS NOT PROPERLY BEFORE THIS COURT AND CANNOT BE CONSIDERED.

The matter of the sufficiency of the evidence was not raised in the court below by motion for a directed verdict or otherwise and for the first time it is now being raised in the Appellate Court. Under these circumstances the appellant has lost his right to challenge in this court the sufficiency of the evidence to sustain the verdict, as there is no ruling of the trial court of which he has a right to complain. The following cases are cited for the Court's approval:

Moore v. United States, C. C. A. 9, 1924, 2 F. (2d) 839, cert. den. 267 U. S. 593;

Lucis v. United States, C. C. A. 9, 1925, 2 F. (2d) 975, cert. den. 268 U. S. 691;

McDonnell v. United States, C. C. A. 9, 1904, 133 Fed. 293, at p. 294:

"It is well settled that where no motion is made for an instructed verdict, and, without objection, the

court is permitted to charge the jury on the assumption that there is sufficient evidence to justify the submission of the case to them, the objection that there was no evidence to support the verdict cannot be heard and considered in an appellate court * * *"

This Court is precluded, therefore, from considering the question of the sufficiency of the evidence to justify the verdict although it has been held that under certain circumstances the question may be reviewed where a palpable and obvious miscarriage of justice would otherwise result.

Bilboa v. United States, C. C. A. 9, 1928, 287 Fed. 125, at p. 126:

"* * * but this is a power rarely exercised and never except for the purpose of preventing judicial wrong. Parties should not be permitted to speculate on the result in a trial court, and, if unsatisfactory, bring the matter here for review for alleged errors not called to the attention of that court, and not passed upon by it."

See also,

Lucis v. United States, C. C. A. 9, 1925, 2 F. (2d) 975, cert. den. 268 U. S. 691;

Marco v. United States, C. C. A. 9, 1928, 26 F. (2d) 315, cert. den. 278 U. S. 613, at p. 316:

"The sufficiency of the testimony to support the verdict was not raised at the conclusion of all the testimony in the court below and for that reason the question is not properly before us for review. Under such circumstances courts will only look into the record far enough to see that there has been

no miscarriage of justice, or that there is some testimony tending to support the verdict."

Love v. United States, C. C. A. 9, 1935, 74 F. (2d) 989;

Ng Sing v. United States, C. C. A. 9, 1925, 8 F. (2d) 919, at p. 921.

There is nothing in the Record which would justify this Court in exercising that extraordinary power.

II.

SUFFICIENT CRIMINAL INTENT WAS PROVEN TO SUPPORT THE VERDICT OF GUILTY.

Counsel has argued that the only direct testimony on the intent of the appellant was given by himself which proved he had no criminal intent. Appellant seems to disregard all other evidence which, though circumstantial in some respects, discloses beyond any doubt defendant's guilt. We call this Honorable Court's attention to some of these facts:

When he filed his Selective Service Questionnaire, defendant requested a "1-A-O" classification, although at first he was deferred as a student, and later as over the age of 28. He was apparently satisfied for it was not until January of 1942, after passing his physical examination, that he made any effort to obtain a "1-A-O" classification, for which he filed a Special Form for Conscientious Objectors. However, in March of 1942, he was classified "1-A" and immediately thereafter requested a personal appearance before the Local Board, which was granted. At the hearing defendant asked for a "1-A-O" classification which was given to him, although the Board believed him to be insincere.

Having been classified in Classification "1-A-O" and his induction into the Army having become imminent, defendant wrote the Local Board on March 27, 1942 (Exhibit "E"), asking it if it knew of any civilian duties he could perform in lieu of induction. It is particularly significant that during this time, from March 18, 1942, to April 2, 1942, defendant made numerous efforts to obtain civilian employment which, peculiarly at that time, was deferrable as essential—investigative work for the Federal Bureau of Investigation, construction work on highways and bridges, and foreign work with oil companies. (See Exhibit "8-8A".) It would appear that any person who was willing to serve his country as a soldier would, after being advised of his availability for military service, arrange his personal affairs in such a manner as to hold himself in readiness for the induction call. It is obvious from the evidence that defendant, in the face of imminent induction, sought to create new obligations and take upon himself new employment which, strangely enough, was then on the deferred list.

It was only after these endeavors failed that defendant requested the Board to reclassify him in Classification "4-E". This was denied him but the Board, in an effort to be fair, allowed him to perfect an appeal to the Appeal Board even though the 10-day appeal period had expired. In his letter of April 18, 1942, to the Appeal Board requesting a "4-E" classification, defendant likewise hinted that an occupational deferment of some kind would be acceptable.

The Appeal Board, by unanimous vote of 3-0, sustained the Local Board's "1-A-O" classification and on August 31, 1942, defendant was so notified.

Immediately upon receipt of his Notice of Classification and on September 2, 1942, defendant appeared at the office of the Local Board and asked the Clerk to let him see his Selective Service file. After he examined it, she told him he would soon receive an Order to Report for Induction, whereupon he stated to her that he did not know whether he could take the induction call. At this point she advised him that there was no way he could stay the call for induction and that the Board could not do so without an order from the State Director of Selective Service and that it had received no such order; and in the absence thereof, upon receiving his Order to Report, he must obey it or he would be subject to report to the Federal Bureau of Investigation. The Clerk testified that at this point defendant said "To hell with the F.B.I.," and further that he would not take the call even if "he had to go to prison." Defendant admitted, on cross-examination, that at the time of this conversation he presumed he would be in violation of the law if he did not obey the Order to Report.

This discloses an attitude on the part of the defendant that under no circumstances would he obey the order, and it is significant that at that time he had not yet initiated his request to the State Director of Selective Service for a review.

However, in spite of the conversation with the Clerk of September 2, 1942, defendant, on September 3, 1942, wired the Local Board requesting it to stay induction.

On September 3, 1942, the Local Board sent defendant an Order to Report for Induction directing him to appear on September 14, 1942. On the face of the Order to Report appears the warning that a wilful failure to report

is a violation of the law subjecting the violator to imprisonment or fine. With this Order to Report was a letter of transmittal (Exhibit 12) directed to the defendant and signed by the Chairman of the Local Board which reads in part as follows:

> "Your Order for Induction for September 14, 1942, is enclosed. This Local Board has no authority to stay your induction as requested by telegram. A stay of induction can only be ordered by the State or National Director of Selective Service. Unless such orders are received by this Local Board, you must report for induction on date ordered.
>
> "Failure to comply with the Order is subject to severe penalty."

Defendant admitted that he received both the Order to Report and the letter on September 4, 1942. It is apparent from the conversation defendant had with the Clerk on September 2, 1942, the warning on the face of the Order to Report, and the letter of September 3, 1942, that defendant knew he must report for induction unless the Local Board received a stay from the State or National Director of Selective Service, and that if he did not report as ordered, he would be subject to criminal prosecution. In fact, defendant admitted on cross-examination that he presumed he would be in violation of the law if he did not report.

In considering the intent and good faith on the part of the defendant, it is significant that:

> (1) during the time from September 4, 1942, the date of his receipt of the Order to Report and the letter of transmittal, to and including September 14, 1942, the date on which he was ordered to report,

that defendant made no effort to, and did not in any way, contact the Local Board to determine whether a stay of induction had been received by it from the State or National Director of Selective Service—knowing that that was the only way in which induction could be stayed. Neither was any effort ever made by the defendant to determine from the Local Board whether the Order to Report was still in effect. The burden was on the defendant to determine if the proceedings were actually stayed and it was incumbent upon him to make a *bona fide* and diligent effort to ascertain the true facts. As was stated by the court in *Alexander v. United States,* 136 F. (2d) 783, no case goes to the extent of declaring that an honest belief with respect to a matter may be rested on mere rumor and that there must be some honest and effective effort made to ascertain the truth before it can be claimed that a conclusion of fact has been reached in good faith;

(2) during the time between September 4, 1942, and September 14, 1942, defendant, without being solicited by anyone, initiated correspondence with the State Director, National Director of Selective Service and the President in an attempt to appeal to the latter—and, strangely enough, the request was for either a "4-E" or a "2-A" classification.

It might at this time be briefly called to the Court's attention that under the Selective Training and Service Act of 1940 and the Rules and Regulations thereunder, defendant has no right to appeal to the President after the Board of Appeal had been unanimous in its vote in reaffirming the Local Board's

determination. The only way in which a Presidential appeal could be taken was by either the State or National Director of Selective Service in the event he deems it to be of a national interest or necessary to avoid an injustice. (See appellee's discussion under Point IV.)

The evidence discloses that no agency or official of the Selective Service System ever requested defendant to take any action or to seek any review after he received his Notice of Classification; or solicited any correspondence relative to defendant's case. Defendant, without right, took it upon himself to do whatever was done. Had either the State or National Director of Selective Service been interested in taking an appeal for the defendant, he would have proceeded as set out under Sections 628.3 and 4 of the Selective Service Regulations. On September 5, 1942, the State Director of Selective Service wired the defendant collect, at his request, and stated that he would read his correspondence, but it must be noted that nothing was ever mentioned concerning an appeal or a stay of induction. The Local Board at no time ever received any order from anyone to stay the induction and defendant was never notified by anyone at any time that an appeal had been taken or a stay granted. This the defendant admitted on cross-examination.

(3) during the time from September 13, 1942, to the time of defendant's arrest under the instant charge, defendant did not make any effort to submit himself to service in the Armed Forces or surrender himself to the jurisdiction of his Local Board for induction.

On September 19, 1942, defendant received a letter from the State Director of Selective Service advising him that his classification was not erroneous, and that no action in his case was warranted. On October 2, 1942, defendant wrote to the Local Board asking it to reconsider his case. Up to the time of his arrest by the United States Marshal on the instant charge, defendant made no effort to submit to induction—in fact, did not go near the Local Board. This in itself would be of no importance except for the fact that defendant claims he would have reported had he not felt that his induction had been stayed. Had this been true, then would not defendant have submitted himself to the jurisdiction of the Local Board for induction upon receipt of the letter of September 19, 1942? The evidence discloses the defendant still negotiating with the Local Board for another classification on October 2, 1942, and upon being given an offer to submit himself to induction, failing to take advantage of the opportunity. Had defendant been in good faith he would not, upon receiving the letter of September 19, 1942, from the State Director, have requested the Local Board to reconsider his case and would have made an effort to enter the service. It is true that after indictment was returned against the defendant, he made several efforts to join some branch of the service but, according to his own admission, he "didn't look too hard," and advised the recruiting officers in each instance that he would not join unless he could do so under his own conditions. Upon arraignment before the United States Commissioner, on October 23, 1942, H. P. Bledsoe, Assistant U. S. Attorney, and the

Commissioner both advised defendant they would take him to the induction station and have him inducted as a "1-A-O." This defendant refused even after being assured by them that the charges pending against him would be dismissed.

Prior to this time and after September 19, 1942, he did not at any time report to the Board his willingness to be inducted and showed no interest in serving in the Armed Forces until after he had been arrested and then offered to join the service only under his own conditions.

In summary, we submit that defendant not only lacked sincerity in his claims but was not in good faith in his contention that he would have reported for induction had he not felt that the Order had been stayed. Defendant was a member of the State Guard of California but resigned about the time he requested a 4-E classification. Prior thereto defendant attempted to join the Federal Bureau of Investigation knowing that he would be required to carry a gun and that he would have to take an oath to do his duty, and shoot to kill if necessary.

The only conclusion which can be reached from the evidence is that the defendant made every effort possible to prevent his induction and when the call came, he actually evaded it. He was willing to take any classification which would defer him out of the induction class and extended his requests for various classifications over a long period of time in what appears to have been a dilatory manner.

His contention that he acted in good faith is baseless and was conceived and born out of a lack of meritorious defense. The evidence shows that he had been advised many times over by the Selective Service officials that he must report for induction and if he was misled in any way, he misled himself by unduly and deliberately initiating what he thought might lead to a review. His belief that the Order was stayed, if he had such belief, was solely the result of his own conduct and imagination, and he must be held responsible for whatever occurred as a result thereof. The burden was upon him to determine if the proceedings were actually stayed and the evidence discloses that no effort was made by him to ascertain from the Board if a stay had been received. This does not show good faith. He made no *bona fide* or diligent effort to ascertain the truth before he acted on his conclusion of fact. Defendant had no reason to believe that he had a right to ignore the Board's Order and made no effort to ascertain whether he was correct in assuming that the Order had been stayed. Had this been the true reason for defendant's failure to report, he would have corrected his delinquency by submitting himself to the jurisdiction of the Board after he became cognizant of the true facts. This he did not do.

In conclusion, it can hardly be said that a criminal intent has not been established beyond a reasonable doubt.

POINT I.

None of the Remarks of Plaintiff's Counsel in Argument to the Jury Were Prejudicial.

The remarks of counsel now complained of were expressed during his closing argument to the jury and reads as follows:

> "I ask you gentlemen to bring in a verdict worthy of a man of this caliber who is willing to let your sons and brothers and friends go out and give their lives for a country which gives him the constitutional guarantee of a fair and full trial in which he can hide behind the defenses he has interposed on his own behalf."

I.

QUESTION OF PREJUDICE TURNS ON FACTS OF PARTICULAR CASE.

Whether remarks of counsel are prejudicial depends upon the facts and circumstances surrounding them in each particular case and the entire record must be considered. Each case must stand on its own.

United States v. Socony Vacuum Oil Co., 310 U. S. 150, 1940;

DeBonis v. United States, C. C. A. 6, 1931, 54 Fed. (2d), cer. den. 285 U. S. 558.

II.

REMARK OF COUNSEL CANNOT BE QUESTIONED ON REVIEW WHERE ATTENTION OF COURT BELOW WAS NOT DIRECTED THERETO AND A RULING MADE AND EXCEPTED TO.

The Supreme Court in

> *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150,

held that it has been generally established that counsel for the defense cannot remain silent, interpose no objections, and after a verdict has been rendered, seize for the first time on the point that the comments to the jury by counsel were improper and prejudicial. The court cited one of its former opinions,

> *Crumpton v. United States,* 138 U. S. 361, decided in 1891,

for the proposition that prejudicial remarks are not always error which will necessarily vitiate the verdict, and quoted:

> "It is the duty of defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in cases of refusal to note an exception."

In accord with the Supreme Court this Honorable Court in

> *Diggs v. United States* (C. C. A. 9, 1915), 220 Fed. 545, affirmed, 242 U. S. 420,

stated at page 556:

> "It is the general rule that improper remarks in argument by the prosecuting attorney, although

prejudicial, do not justify reversal unless the court has been requested to instruct the jury to disregard them, and has refused so to do."

To the same effect see:

Utley v. United States (C. C. A. 9, 1940), 115 Fed. (2d) 117, cer. den. 311 U. S. 719;

Heskett v. United States (C. C. A. 9, 1932), 58 Fed. (2d) 897, cer. den. 287 U. S. 643;

Dampier v. United States (C. C. A. 9, 1925), 2 Fed. (2d) 329;

Donaldson v. United States (C. C. A. 9, 1913), 208 Fed. 4;

Vendetti v. United States (C. C. A. 9, 1930), 45 Fed. (2d) 543, at p. 544.

It is, therefore, respectfully submitted that in view of the fact that it does not appear from the record on appeal that appellant objected to the remark complained of, or in any way called it to the trial court's attention, and made no objection to the submission of the case to the jury, that there is nothing upon which the alleged error can be predicated. Counsel owed a duty to the trial court to call its attention to the language used if he felt that it was objectionable. Had objection been made, the prosecuting attorney would then have had the opportunity to withdraw it and the court could have taken steps to counteract its effect, if any. It must therefore be assumed that defendant's counsel did not consider the remarks prejudicial at the time they were made and is now grasping this point for the first time in the hope that the court will use it to reverse the conviction.

III.

REMARK OF COUNSEL WAS NOT SO PREJUDICIAL AS TO JUSTIFY THE COURT IN NOTICING THE ALLEGED ERROR ON ITS OWN MOTION.

The only time the Appellate Court may notice misconduct of counsel in argument to the jury as error where the trial court's attention was not called thereto and a ruling made and excepted to, is in an aggravated case where remarks were so prejudicial as to bring about a miscarriage of justice. However, the case must be exceptional, the remarks extreme, the prejudice glaring and the errors obvious. The resulting prejudice must be far more serious and aggravated than where the remarks are properly before the appellate court. To this effect see:

United States v. Socony Vacuum Oil Co., 310 U. S. 150;

Crumpton v. United States, 138 U. S. 361, at p. 364.

> "But as we point out hereafter, the exceptional circumstances are not present here.
>
> "They (the remarks) were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error."

It is clear therefore that the circumstances must be exceptional for the court to notice error on its own motion and the record discloses that they are not present in this case. "It must appear that the matter objected to was plainly unwarranted and so improper as to be clearly in-

jurious to the accused" (*Chadwick v. United States,* 141 Fed. 225), and that it was an aggravated case in which it appears that the verdict was clearly the result of "passion aroused through extreme argument which plainly stirred resentment or aroused prejudice of the jury." (*Pietch v. United States* (C. C. A. 10, 1940), 110 Fed. (2d) 817, cer. den. 310 U. S. 648.)

IV.

APPELLANT HAS SHOWN NO PREJUDICE RESULTING FROM THE REMARK COMPLAINED OF.

In the heat of argument counsel may occasionally make remarks which might be prejudicial to the accused. However, if every such remark was ground for reversal, comparatively few verdicts would stand since, in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by the temptation to make improprietas statements. A United States Attorney's duty is to prosecute with earnestness and vigor and to strike hard blows where necessary, but this earnestness or even a stirring eloquence cannot convict him of hitting a foul blow.

The burden of proving prejudice is upon the appellant. Since the enactment of Title 28, United States Code, Section 391, an error is not presumed to be prejudicial. Appellant is not entitled to a reversal of a judgment unless it appears that he has been denied some substantial right and has thereby been prevented from having a fair trial.

Goldstein v. United States (C. C .A. 8, 1933), 63 Fed. (2d) 609;

Mansfield v. United States (C. C. A. 8, 1935), 76 Fed. (2d) 224, cer. den. 296 U. S. 601.

Prejudice is difficult to prove as it is particularly within the knowledge of the trial judge whether remarks of counsel during the trial tended to prejudice the cause of a party. The court room atmosphere, prior remarks and other factors which cannot be appraised by a reviewing court, may render remarks of counsel innocuous although they may appear viciously prejudicial when removed from their setting. Therefore, the only tangible thing the Appellate Court can rely on in reaching its determination is the record as presented on appeal which discloses not only the weight of the evidence, but the remarks of adverse counsel and the length of the argument. In considering the matter we are justified in assuming that the jurors possess sufficient common sense and discrimination to enable them to evaluate the conduct and remarks of counsel even though they should offend ordinary standards of propriety. It is only fair to jurors to assume that they do not always take counsel as seriously as counsel take themselves.

See:

United States v. Goodman (C. C. A. 7, 1940), 110 Fed. (2d) 390.

1. Entire Record Must Be Considered.

The Appellate Court must review the argument as a whole taking into consideration the entire array of established facts and circumstances.

Said the court in:

Ippolito v. United States (C. C. A. 6, 1940), 108 Fed. (2d) 668, at p. 670:

"* * * the inquiry must always be as to whether in view of the whole record the impression conveyed

to the minds of jurors by prejudicial matter is such that the court may fairly say it has not been successfully indicated by the rulings of the trial judge * * *."

To the same effect see:

Peitch v. United States (C. C. A. 10, 1940), 110 Fed. (2d) 817, cer. den. 310 U. S. 648.

2. To Be Reversible Error It Must Be Proved That the Remarks in Question so Stirred the Jury That the Verdict Was the Result of Passion or Prejudice.

It is well established that if guilt of the defendant is clearly established by the evidence, such remarks should not work a reversal,

Echikovitz v. United States (C. C. A. 7, 1928), 25 Fed. (2d) 864,

and the Appellate Courts have held that even though the remarks are improper they will not upset the conviction of a plainly guilty man.

United States v. Lotsch (C. C. A. 2, 1939), 102 Fed. (2d) 1935, cer. den. 307 U. S. 622;

Ippolito v. United States (C. C. A. 6, 1940), 108 Fed. (2d) 668, at p. 670.

In the first place, the remark made by counsel was not improper as it was only a statement reflecting the general conditions of the time. In the second place, the remark was not in any way responsible for the verdict rendered, as the guilt of the defendant was overwhelmingly established by the evidence.

The court in

United States v. Dubrin (C. C. A. 2, 1937) 93 Fed. (2d) 499, cer. den. 303 U. S. 646,

held that the guilt of the defendant was so plain that it precluded a reversal on account of a few emotional outbursts of counsel. At page 506 the court stated:

> "The situation in the case at bar is quite different from that in *Berger v. United States,* 295 U. S. 78. The government's proof there was much weaker, the acts of its counsel were persistently objectionable, * * *. The attempt to turn this trial of men whose guilt was abundantly proved into a trial of government's counsel, though a not infrequent expedient of defendants who have no other recourse, ought not, in our opinion to succeed."

In the case of

Fitter v. United States (C. C. A. 2, 1919), 258 Fed. 567,

it was urged that the appeal of counsel to render a verdict from patriotic motives had a greater effect upon the jury than the evidence presented by the government. The language used is too lengthy to quote but was blistering and vicious in its reminder to the jury that our country is at war and that our sons are dying for it. The court stated at page 573:

> "The cases show that a prosecuting officer, while he may not appeal either to the fears or the vanity of a jury, and so seek to coerce or cajole them into a verdict of conviction, and in this case he did neither, may legitimately appeal to them to do their full duty in enforcing the law. In so far as counsel went beyond that legitimate appeal we are not inclined upon this record to say that the defendant was prejudiced

so that the verdict should be set aside. If the evidence of guilt was less overwhelming, and any possible and reasonable doubt of guilt existed, there would be better reason for asking the court to reverse; but, in view of the evidence which we find in the record, we do not deem it proper, in the due administration of criminal justice, to reverse the judgment on the ground assigned."

It is well established therefore, that if defendant was convicted by evidence so clear and convincing that the jury could not have determined otherwise then as it did, the error is harmless. This rule was adopted in

Robbins v. United States (C. C. A. 9, 1916), 229 Fed. 987, at p. 999:

"No possible misconduct on the part of the District Attorney could have affected the conclusion which the jury was compelled to reach and it is unnecessary to consider the matter further than to say as was said by the court below, that the District Attorney's remarks were hardly commendable."

So said the Supreme Court in

Berger v. United States, 295 U. S. 78, 1935, at p. 89:

"If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached."

An examination of the record on appeal will disclose that the guilt of the defendant was well established and that the jury would have found the defendant guilty regardless of the remark made. For further discussion as to a clear showing of evidence of guilt see argument under Point XI.

3. The Remark Complained of Was Only Incidental and an Isolated Instance.

It would be difficult to say that the minds of the jurors could be so prejudiced by incidental statements that they would not appraise the evidence objectively and dispassionately.

The remark complained of is a single incident, the very last statement made by counsel for the government after a long closing argument based on the evidence. Where the statements are only minor aberrations and not cumulative evidence of a procedure dominated by passion and prejudice the Supreme Court has held that reversal will not promote the ends of justice.

> *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150.

Where the assertions of errors are isolated and casual episodes not reflective of the quality of the argument as a whole the court will not reverse.

In the instant case the whole argument is not in the record and the matter should be considered in the light of *Silverman v. United States* (C. C. A. 1, 1936), 59 Fed. (2d) 636, cer. den. 287, U. S. 640:

> "Only the merest skeleton of the evidence objected to under these assignments is presented to this court. Unconnected with what went before or followed, it has little bearing that can be deemed prejudicial to the appellant."

It is clear therefore that only such misconduct as was pronounced and persistent, with a probable cumulative effect upon the jury can be regarded as consequential.

> *Berger v. United States,* 295 U. S. 78, 1935.

4. Remark Complained of Was Provoked and Invited by Opposing Counsel.

Counsel for the defense, in his argument to the jury, attempted to explain why the defendant took the unusual position in view of the conditions of the world today and requested the jurors to judge him by his standards and not their own. Counsel stated among other things:

> "You will agree with me in times of peace his standards are perfectly sound. Here is a man who attempted to apply some of the standards of peace, during which he applied for himself in his life, during war time."
>
> * * * * * * * *
>
> "When there is a Selective Service Law and the nation is in an emergency, we hate to kill, but we feel there is nothing that hurts our conscience in killing a German or a Japanese who threatens our liberties. That is how the normal human minds, most people's minds function * * *." [Record 106.]
>
> "* * * What kind of man is this man? Who is he to bargain with the Government? What do we care about him when we are fighting a war, to let him write his own oath? Who can take that kind of an attitude? Maybe I am making the argument that the Prosecutrix should make; I hope I am not making it too convincingly * * *." [Record 107.]
>
> "The special characteristic of the liberties guaranteed in the Bill of Rights, under their shield are that many types of opinions and beliefs can develop unmolested and unobstructed." [Record 108.]

The Eighth Circuit Court of Appeals in *Johnson v. United States,* 126 Fed. (2d) 242, a Selective Service case

in which the language of the prosecuting attorney was clearly improper and in some respects actually vicious, states:

> "This statement might or might not be error and prejudicial error. This depends largely on whether it was proper answer to or justified by something in the proceeding argument for appellant."

Where the attorney for the government was endeavoring to counteract certain arguments made by defendant's counsel, such remarks may not be held to be prejudicial.

> *United States v. Johnson* (C. C. A. 3, 1941), 129 Fed. 954,

especially where "defendant's own counsel had made statements referring to the same subject matter."

See, also:

> *Pollock v. United States* (C. C. A. 4, 1929), 35 Fed. (2d) 174,

and

> *Rice v. United States* (C. C. A. 2, 1929), 35 Fed. (2d) 689,

where the court held that there was no prejudice where the remarks were fair comment in answer to the remarks in the summation of counsel for defendant.

In conclusion the court might be reminded that the trial judge could have intervened at the time the remark was made but apparently in the exercise of his discretion he did not regard the language of counsel of sufficient importance to call for interference on his part.

The exercise of that discretion will not be reviewed by an Appellate Court unless the invective is so palpably improper that it might be seen to have been clearly injurious.

Johnson v. United States, 154 Feb. 445.

Appellant has not attempted to fit the facts disclosed by the record to the law propounded by him in his citation of the *Viereck* case. Appellee agrees with the principles set forth therein but respectfully submits that they do not apply here. In passing it might be mentioned that the *Bagley, Coffman* and *Atkinson* cases as well as *Ex parte Milligan* do not involve the matter of improper remarks and are hardly applicable to the question at bar.

POINT II.

District Court Did Not Err in Making Certain Comments During the Course of the Trial.

I.

ALLEGED ERROR RELATING TO COMMENTS OF TRIAL JUDGE NOT PROPERLY BEFORE THE COURT.

"Moreover, no objections were made and no exceptions were taken to the remarks of the trial court at the time and consequently error cannot be predicated thereon.

* * * * * * * *

"There remains for consideration the claim of appellants that they were deprived of a fair trial by the conduct of the trial court. No objections were made to any of the several acts of the trial judge now alleged to be misconduct and no exceptions were taken thereto.

"It is the duty of the trial judge in the conduct of the trial to expedite matters and prevent the waste of time. Appellants were represented by experienced and able counsel and they made no objections to the attempts of the court to expedite the trial and cannot be heard now on such objections."

Baldwin v. United States (C. C. A. 9, 1940), 72 Fed. (2d) 810, 812, cer. den. 295 U. S. 761;

Cluccarello v. United States (C. C. A. 3, 1943), 68 Fed. (2d) 315;

Kettenbach v. United States (C. C. A. 9, 1913), 202 Fed. 377, at p. 384.

II.

ENTIRE PROCEDURE IN THE COURSE OF WHICH COMMENTS WERE MADE DOES NOT DISCLOSE THEY WERE IMPROPER.

In order to determine whether remarks of the trial judge were prejudicial they must be considered in connection with the procedure had before and subsequently thereto. In

Hargrove v. United States (C. C. A. 8, 1928), 25 Fed. (2d) 258,

the remark complained of was:

"Now there is a respectful way to take exceptions and you know it."

The court stated:

"This language on the face of the printed record seems uncalled for, but, as was freely conceded in argument, we cannot visualize the court room scene nor properly impute reversible error to language no

more essentially prejudicial than that quoted. It is to be read in connection with the entire procedure in the course of which it was uttered."

It will be noted from the Record that several comments complained of are set forth therein by themselves without the proceedings had prior and subsequently thereto which make it difficult, if not impossible, for the Appellate Court to determine their propriety.

III.

NO RESULTING PREJUDICE HAS BEEN ESTABLISHED BY APPELLANT.

The burden of showing prejudice resulting to appellant from the court's comments is on him.

Goldstein v. United States (C. C. A. 8, 1933), 63 Fed. (2d) 609, 614;

Mansfield v. United States (C. C. A. 8, 1935), 76 Fed. (2d) 224, cer. den. 296 U. S. 601.

IV.

NO PREJUDICE COULD POSSIBLY RESULT TO DEFENDANT FROM THE COMMENTS MADE.

It is well settled that the conduct of a trial rests within the discretion of the trial judge. He alone is familiar with the circumstances. It is the duty of the court to keep the trial progressing, to expedite matters and to prevent dilatory tactics of council. It is obvious that the comments of the court objected to were made in the exercise of that duty and had no bearing on the guilt of the defendant, the state of the evidence on the issues, or on the facts or questions to be submitted to the jury, and did not tend

nor were they calculated to create in the minds of the jurors a prejudice against the defendant from which the verdict resulted.

> *Adler v. United States* (C. C. A. 5, 1910), 182 Fed. 464, 472.

The court stated in that case that it was the duty of the trial judge to facilitate the orderly progress of a trial and to clear the path of petty obstructions and that it is a matter within the discretion of the court with which the Appellate Court would be reluctant to interfere.

> *Baldwin v. United States* (C. C. A. 9, 1934), 72 Fed. (2d) 810, cer. den. 295 U. S. 761.

The court in

> *Goldstein v. United States* (C. C. A. 8, 1933), 63 Fed. (2d) 609, at p. 613,

stated:

> "Such incidents are often regarded as trivial during the trial of the case and are quickly lost sight of, but, when set forth in the record and emphasized by counsel on appeal, they take on an importance which they never actually possessed. It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy. * * * An Appellate Court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising anticipated judgment upon the merits."

See also:

United States v. Glasser (C. C. A. 7, 1940), 116 Fed. (2d) 690,

citing the *Goldstein* case, and

Mansfield v. United States (C. C. A. 8, 1935), 76 Fed. (2d) 224, cer. den 296 U. S. 601, at p. 232.

"An Appellate Court should hesitate to reverse a case for the alleged misconduct of the trial court unless it appears that the remarks complained of tended to disparage the defendant before the jury and to prevent the jury from rendering an impartial judgment in the case."

An examination of the comments objected to discloses that they were made solely in the exercise of the court's duty to conduct the trial of the case and that no opinion of guilt of the defendant was expressed nor was any partiality shown. In connection with comment (a) the Record discloses that the question was asked and answered many times and, therefore, no prejudice could possibly result.

It is well settled that the court may shorten the examination of witnesses by counsel and that this is a matter within the discretion of the court.

Adler v. United States, supra.

The court's attention is also called to the fact that comment (a) has not been fairly set forth in the record. We realize that the Reporter's Transcript cannot be considered by the Appellate Court but we feel that counsel for the appellant was not fair in setting out the court's remark because it was not in answer to the question asked

by counsel but actually to intervening colloquy which impressed the court with the fact counsel wished to argue the point after the court's ruling sustaining an objection to the question was made.

Comment (b) can be likened to the facts in

Baldwin v. United States, supra.

Defense counsel asked for sufficient time within which to inspect the records, which was denied. The court stated that it was the duty of the trial judge to expedite matters and prevent the wasting of time.

Comment (c) appears as a lone remark in the Record without any showing why the statement was made and to what it was a response, if anything.

In connection with comments (d) and (e), this Honorable Court's attention is called to

Simon v. United States, 123 Fed. (2d) 80, 83 (C. C. A. 4, 1931), cer. den. 694.

"It is contended that certain arguments of the court were prejudicial in trying to speed up the trial and avoid irrelevant details in the examination of witnesses. The court said: 'We will get through before Christmas or I will know why * * *.'

"It is not surprising that certain statements of the court, divorced from their context, can be twisted by counsel to appear in other than their true light. None of the statements objected to, when read in their context, are prejudicially erroneous."

In connection with comment (e) there is certainly nothing prejudicial about the remark made wherein the Government was granted permission to reopen its case. In

> *United States v. Liss* (C. C. A. 2, 1943), 137 Fed. (2d) 995, at p. 999,

the court stated:

> "The next objection common to a number of the accused is the judge's bias against them. It may perhaps have been true that at times his manner was not as urbane as could have been wished, and counsel may have occasionally smarted under his admonitions, but we can find no evidence that he improperly cut short their examination and certainly none whatever that he expressed even indirectly an opinion as to the guilt of the accused."

The appellant must show that the remarks influenced the jury in its verdict. This cannot be if the evidence taken as a whole is conclusive of defendant's guilt, and where this exists the Appellate Court will not interfere with the judgment.

> *Hargrove v. United States* (C. C. A. 8, 1928), 25 Fed. (2d) 258, p. 262;
>
> *United States v. Krakower* (C. C. A. 2, 1936), 86 Fed. (2d) 111.

In the latter case the court felt that the trial judge actually showed animosity to the defendant but still would not reverse the conviction because the guilt of the defendant was amply disclosed by the evidence.

The conduct of the court, to be prejudicial must be intended or calculated to disparage the accused in the eyes of the jury and prevent it from exercising impartial judgment on the merits.

POINT III.

District Court Did Not Err in Refusing to Admit in Evidence Defendant's Exhibit "C."

The record discloses at page 76 that Exhibit "C" for Identification is the same document as Defendant's Exhibit "I" which was offered and received in evidence and read to the jury. Defendant's Exhibit "C" for Identification is the original of Defendant's Exhibit "I" in evidence.

The purpose of offering Exhibit "I" in evidence was to show the absence of criminal intent on the part of the defendant. There is no question as to whether the document had actually been sent by the defendant or actually received by the Selective Service Board, as those matters had been admitted by the clerk. It would appear, therefore, that since Defendant's Exhibit "I" in evidence was offered and read to the jury to show intent; that Defendant's Exhibit "C" for Identification was offered for the same purpose; and that they were one and the same document except for the fact that Exhibit "C" for Identification was the original of Defendant's Exhibit "I" in evidence; that the assignment of error is without merit. There cannot possibly be shown any prejudice for the reason that the contents of the exhibit were read to the jury and submitted to it for its consideration in determining the criminal intent of the defendant.

POINT IV.

District Court Did Not Err in Sustaining Objection to the Offer of Defendant's Exhibit "K" in Evidence.

For the court's consideration Exhibit "K" for Identification is a letter dated September 4, 1942, consisting of five pages, written by the defendant to the State Director of Selective Service, Leitch. The letter contains a request that he review defendant's classification.

I.

ASSIGNMENT OF ERROR IN CONNECTION WITH DEFENDANT'S EXHIBIT "K" IN EVIDENCE IS NOT PROPERLY BEFORE THE COURT.

Said this Honorable Court in *Conway v. United States* (C. C. A. 9, 1944), 142 F. (2d) 202, at p. 203:

> "Assignment IV is that the court erred in rejecting evidence. (Assignment IV relates to the rejection of affidavits of members of a sect called Johovah's Witnesses). These assignments do not as required by Rule 2(b) of our rules governing criminal appeals 'quote the grounds urged at the trial for the objection and the exception taken and the full substance of the evidence admitted or rejected,' hence these assignments need not be considered."

To the same effect see:

Wheeler v. United States (C. C. A. 9), 77 F. (2d) 216, 218;

Tudor v. United States (C. C. A. 9, 1944), 142 F. (2d) 206;

Hopper v. United States (C. C. A. 9, 1944), 142 F. (2d) 181.

The assignment of errors sets out that the District Court erred in refusing to admit in evidence Defendant's Exhibit "K" in that the same has a direct and material bearing on the existence of criminal intent. The grounds urged at the trial for the objection and the exception taken and the full substance of the evidence rejected does not appear therein.

II.

DEFENDANT'S EXHIBIT "K" FOR IDENTIFICATION IS IMMATERIAL TO CRIMINAL INTENT.

The evidence discloses the following facts which have a bearing on the court's ruling on this matter.

Defendant appealed to the Board of Appeal which, on August 20, 1942, sustained his 1-AO classification by unanimous vote of the members, and on August 31, 1942, defendant was so advised.

On September 2, 1942, defendant talked with the clerk of the local Board at the Board Office, at which time she advised him that he would receive an Order to Report for Induction soon; that at that time defendant advised her that he did not know whether he would obey it. In reply the clerk stated that there was no way he could hold up his induction order and that the Board could not stay it unless it was ordered to do so by the Director of Selective Service and that the Board had received from no one a stay of induction and that under the circumstances he would have to abide by the Order to Report and that if he failed to do so he would be subject to report to the F. B. I. Defendant in response thereto stated "to hell with the F. B. I.," and that he would not report even if he had to go to prison. Defendant admitted on cross-

examination that he presumed at the time of this conversation that a failure to obey the order would be a violation of the law.

On September 3, 1942, the Board sent defendant an Order to Report for Induction, whereupon it stated that a wilful failure to report would be a violation of law punishable by fine and/or imprisonment; together with a letter of transmittal stating that it would be necessary for him to report and if he did not do so he would be in violation of the law.

On September 4, 1942, defendant received his Order to Report for Induction and letter of transmittal and on the same day he sent Defendant's Exhibit "K" for Identification to Colonel Leitch, State Director of Selective Service requesting him to review his classification.

Counsel has argued that Defendant's Exhibit "K" for Identification is material to the intent of the defendant, but a consideration of the evidence and the Rules and Regulations of the Selective Service system does not disclose any merit in that argument. It would appear that prior to the sending of Exhibit "K" for Identification defendant had already expressed his intention of failing to report for induction.

III.

DEFENDANT, UNDER THE LAW, HAD NO RIGHT TO APPEAL TO THE PRESIDENT OR ANYONE ELSE CONNECTED WITH THE SELECTIVE SERVICE SYSTEM.

Section 628.2 of the Selective Service Regulations provides that a registrant may take an appeal to the President only where "one or more members of the Board of Appeal dissent from such classification."

The evidence shows that the Board of Appeal sustained defendant's 1-AO classification by unanimous vote. This precludes the defendant from appealing to the President through the Director of Selective Service.

However, under Section 628.1 of the Rules and Regulations, a State or National Director of Selective Service, if either deems it to be of the national interest or necessary to avoid an injustice, may appeal to the President. This section provides the method used by the Director of Selective Service in perfecting such appeal. Section 628.4 of the Selective Service Regulations provides that when an appeal is taken the Local Board shall notify the registrant and forward the entire file to the State Director which is in turn forwarded to the Director of Selective Service.

At no time did the State or National Director of Selective Service deem it advisable to appeal defendant's classification to the President and no appeal was ever taken by either one. The Local Board was never advised in any way that the Director of Selective Service intended to appeal or review defendant's file and never received any request for registrant's file, nor was the file ever forwarded to the National Director. No one connected with the Selective Service system ever advised or directed or ordered the Local Board to stay induction or cancel the order to report; nor was the Local Board ever advised defendant's case would be reconsidered or reviewed; nor was defendant ever notified by anyone that an appeal had been taken or a stay of induction granted.

It is clear that at the time defendant sent Exhibit "K" for Identification to the State Director of Selective Service that he had already received his Order to Report for Induction; that he had been advised by the clerk and

the Board Chairman that he must obey it and that if he did not do so he would be in violation of the law, and that he so understood that to be the case; that he at no time ever received an intervening cancellation of the order or word from any Selective Service official or agency permitting him to ignore the Order to Report for Induction.

It is especially significant in considering the materiality of Defendant's Exhibit "K" for Identification that no one connected with the Selective Service system ever requested defendant to submit correspondence but that all of defendant's negotiations with the Selective Service officials, after being advised of his classification, were voluntary on his part, one sided and initiated by him without solicitation. It is likewise important to bear in mind that defendant's attempted negotiation with the State Director of Selective Service as reflected by Exhibit "K" for Identification was initiated by him without right after receiving his Order to Report, and at most is self-serving. The testimony of the clerk shows that in prior conversation with her he stated he would not report even though he might have to go to prison and that he had already made up his mind not to report for induction before sending Exhibit "K" for Identification. Therefore, it has no bearing on defendant's intent to disobey the order and since it does not reflect anything which would show that the order was not in effect or that defendant had been led to believe by someone in authority that it was not in effect, it could not be material. No Selective Service agency or official requested the correspondence submitted by defendant and his actions were not only voluntary and one sided, but initiated without right. If defendant was misled, he misled himself by his own actions. Had the State Director of Selective Service requested the correspondence then the Exhibit K for Identification might be material.

POINT V.

District Court Did Not Err in Sustaining the Objection to the Offer of Defendant's Exhibits "N" and "O" in Evidence.

Defendant's Exhibit "O" for Identification is a telegram which was sent to the National Service Board for Religious Objectors by defendant on September 2, 1942, wherein he requested advice concerning his draft status. Defendant's Exhibit "N" for Identification is a telegraphic answer received by defendant from the National Service Board for Religious Objectors on September 4, 1942.

In connection with this Assignment of Error, appellee adopts the argument set forth under Point IV and submits, first, that the claimed error is not properly before the court, as the Assignment of Error does not conform with Rule 2(b) of our rules governing criminal appeals; and, secondly, the Exhibits "N" and "O" for Identification are immaterial in determining defendant's intent.

The Record is silent as to the nature of the National Service Board for Religious Objectors and there is no evidence to show of what the Board consists, but suffice to say it is not an agency of the Government and is in no way connected with the Selective Service system. The Board has no authority to act for it and is a stranger to the Selective Service system. Surely it cannot be said that a registrant who is ordered into the military service can defend himself on a failure to report for induction on the ground that a third party told him he did not have to report. It is difficult to understand how communications with third parties could be material in ascertaining the intent of the defendant especially in an instance in which defendant had no right to rely upon the opinions of those persons.

POINT VI.

The District Court Did Not Err in Granting Plaintiff's Motion to Strike the Defendant's Answer Upon Inquiry as to Reason He Had for Failure to Report.

I.

ASSIGNMENT OF ERROR CANNOT BE CONSIDERED AS ERROR COMPLAINED OF DOES NOT APPEAR IN THE RECORD ON APPEAL.

A reading of the Record fails to disclose anywhere therein the question purportedly asked by defendant's counsel, the purported answer given and the purported motion to strike as well as the court's ruling thereon. Although these matters appeared in the Reporter's Transcript, it does not appear in the Record on appeal and cannot be considered by this Honorable Court as a question properly before it. It is well settled that the Reporter's Transcript is not a Bill of Exceptions and is no part of the Record.

Conway v. United States (C. C. A. 9, 1944), 142 F. (2d) 202, 204;

Hursh v. Killits (C. C. A. 9, 1932), 58 F. (2d) 903;

Lau Lee v. United States (C. C. A. 9, 1933), 67 F. (2d) 156.

The Appellate Court cannot determine whether the error claimed exists unless it is before the court in the Record on Appeal, otherwise the court is helpless to determine error or lack of error or prejudice.

Nolan v. United States (C. C. A. 8, 1935), 75 F. (2d) 65:

"The duty to show error involves as a necessary step therein, the obligation to bring up sufficient record therefor, and, where appellant fails to do so, he has not sustained the burden of showing error."

The court cannot consider claimed errors not exhibited by the Record. See:

Black v. United States (C. C. A. 6, 1925), 7 F. (2d) 468, cer. den. 269 U. S. 568;

Fisher v. United States (C. C. A. 4, 1926), 13 F. (2d) 756, at p. 758:

"Thus the court is warranted under its rules in not considering these assignments of error, where the bill of exceptions does not set forth the facts with sufficient clearness to enable the court to pass upon them intelligently."

II.

THE COURT DID NOT ERR IN GRANTING THE MOTION TO STRIKE.

There is no merit to the contention that the court erred in allowing the answer in question to be stricken, as no prejudice resulted therefrom. Had the claimed error been set out properly in the Record on appeal, it would have disclosed the proceedings during which the question was asked, from which it appears that the same question had already been asked and answered several times previously and, furthermore, that the answer was not responsive to the question. After the motion to strike was granted, counsel later asked a similar question to which a response

was made—in fact, to which the same response was made. It is clear from a reading of the evidence that defendant had previously gone into the matter of intent in this connection quite thoroughly. [See Record 82 and 87.]

The question of intent was properly inquired into by counsel for the defendant and he had ample opportunity at other times, and did, elicit from the defendant the same answer which was ordered stricken. Under these circumstances it is difficult to see how any resulting prejudice could be shown.

POINT VII.

The Court Did Not Err in Refusing to Give Defendant's Instruction Relating to Good Faith of the Defendant in Connection With His Knowledge.

Defendant requested the following Instruction to be given to the jury:

> "You are instructed that if a registrant has been advised by an agency of the Selective Training and Service System that his classification is being reviewed and that the registrant relies in good faith upon said representation, and in good faith believes that an Order of a Local Draft Board is stayed while said review is pending, that any violation by said registrant under the above circumstances of any Order of a Local Board is not committed knowingly.
>
> "You are further instructed that if a registrant in good faith because of reliance upon information which he in good faith believes that an Order of a Local Draft Board has been stayed and that he is under no legal requirement to comply with such Order, violates said Order he does not do so knowingly."

Any error in a charge to a jury for any failure to give a requested instruction which does not affect the substantial rights of the defendant does not call for a reversal of the conviction.

> *Guy v. United States,* C. C. A., D. C. 1929, 107 F. (2d) 288.

It has been further held that even though an error was made by the court in failing to charge the jury, that if the evidence discloses overwhelmingly that the defendant is guilty, that the court will not reverse the conviction.

> *Roubay v. United States,* C. C. A. 9, 1940, 115 F. (2d) 49:
>
> "Assuming, arguendo, that the instruction was error, the evidence as a whole is so convincing of the guilt of the appellant he suffered no prejudice."

I.

NO PREJUDICE CAN BE SHOWN AS DEFENDANT'S REQUESTED INSTRUCTION WAS COVERED BY THE CHARGE GIVEN BY THE COURT.

Defendant desired to have the jury instructed that if he in good faith believed that the Order of the Local Draft Board had been stayed that he did not knowingly violate the Order.

The following charge was given to the jury:

> "What you are required to determine beyond a reasonable doubt, and it is your exclusive province to determine, is whether or not the defendant after registering and receiving the Order of the Board, *knowingly* failed to respond to the Board's Order to Report of Induction. In determining this you may consider any matters other than those mentioned

which might indicate to you the lack of the intent on the part of the defendant to disregard the Board's Order, such as whether or not the Notice to Report was sent to the registrant and whether or not the registrant actually received or failed to receive it through no fault or neglect of his own, *or in good faith believed the Order of Induction was suspended.*" (Italics ours.)

"You are further instructed that any Order to Report for Induction issued by Local Board No. 228 after the defendant was notified of the Appeal Board's determination, that is, that he had been retained in Classification '1-A-O' is effective and valid and must be obeyed by the registrant *unless the registrant, defendant, in good faith believed the Order of Induction was suspended and therefore not effective.*" (Italics ours.) [R. 119.]

"You are instructed that if, at the time defendant attempted to appeal to the President through the State Director of Selective Service, he knew that Local Board No. 228 could not stay his induction unless the State Director of Selective Service ordered the Board to do so, that he must report for induction in accordance with the Order to Report previously mailed to defendant or become delinquent with the Board, and further, that no stay of induction had been received by Local Board No. 228 from the State Director of Selective Service, and that defendant did not report at the time and place so ordered, then you must find that the defendant knowingly failed and

neglected to appear in accordance with the said Order, *unless the registrant, the defendant, in good faith believed the Order of Induction was suspended and therefore not effective.*" (Italics ours.) [R. 120.]

It appears that whenever error resulting from the court's failure to instruct the jury as requested by the defendant, is corrected by other instructions given to the jury which contained the substance, if not the words, of Appellant's requested instructions, it is harmless. It can, therefore, not be said that refusal to give this Instruction was prejudicial.

II.

THE QUESTION OF GOOD FAITH DOES NOT APPEAR MATERIAL AND ANY REFUSAL ON THE PART OF THE COURT TO INSTRUCT THE JURY REGARDING GOOD FAITH IS NOT ERROR.

In the case of

Alexander v. United States, C. C. A., Dist. of Columbia, 136 F. (2d) 783,

the court discussed the question of good faith and stated that any instruction relating thereto was properly refused. At page 784, the court stated:

"But even in those States taking the minority position it is necessary that the accused have made a *bona fide* and diligent effort to ascertain the true facts. In the present case appellant's evidence wholly fails to measure up to this standard. His testimony goes no further than the statement that he received

information of the divorce in a letter which he neither retained nor answered. With every opportunity at hand to ascertain the truth he made no effort to do so. He wrote neither his wife nor his or her family, nor any of his friends and he heard nothing from any of them. No case goes to the extent of declaring that an honest belief with respect to a matter of this nature may be rested on a mere rumor, which is all there was here. As was said in the Texas case of *Gillum v. State,* there must be some honest and effective effort made to ascertain the truth before it can be claimed that a conclusion of fact has been reached in good faith. In this view appellant would clearly be guilty under either of the conflicting rules to which we have referred. See *White v. State,* 157 Tenn. 446, 9 S. W. 2d 702. Hence the refusal to give the instruction asked and the giving of the other was not prejudicial error."

The evidence shows no effort on the part of the defendant to contact his Local Draft Board on and up to the time of induction to determine whether the Order to Report for Induction had been stayed either by the State Director of Selective Service, the National Director of Selective Service, or the Local Draft Board. It would appear that in order to claim a conclusion of fact had been reached in good faith, it must be shown that defendant made every effort to determine the truth of the matter.

POINT VIII.

The District Court Did Not Err in Refusing to Give to the Jury an Instruction Relating to Good Faith of the Defendant in Connection With His Felonious Violation of the Law.

The requested Instruction reads identically with that one set forth under Point VII except for the fact that the word "felonious" is substituted for the word "knowingly."

The appellee adopts the argument set forth under Point VII as being applicable to this Instruction and in addition submits that it is neither necessary to aver that the act was feloniously done nor to prove the same.

Although the Indictment charges that the defendant did then and there knowingly, wilfully, unlawfully and feloniously fail to report for induction, the statute itself which makes the act a crime merely states that any person "who shall knowingly fail or neglect to perform such duty" shall be punished.

United States Code, Title 50, Sec. 311.

The act does not use the words "unlawfuly, feloniously and wilfully."

In all indictments the acts constituting the gravaman of the charge are generally alleged to have been feloniously done. The characterization and the proof thereof, how-

ever, is necessary only where the statute makes felonious intent one of the constituent elements of the crime.

Bannon v. United States, 156 U. S. 464;
Myres v. United States, 256 Fed. 779.

Section 311, Title 50, United States Code, does not make felonious intent an element of the crime punishable thereunder.

POINT IX.

The District Court Did Not Err in Refusing to Give to the Jury an Instruction Relating to the Good Faith of Defendant in Connection With His Wilfulness in Violating the Law.

The Instruction requested is identical with that set forth under Point VII except that the word "wilful" is substituted for the word "knowingly."

Appellee respectfully refers this Honorable Court's attention to the argument under Point VII and adopts it in connection with and as applicable to this instruction.

In addition the Court's attention is directed to the fact that as a matter of law the word "knowingly" comprehends within its meaning the terms "wilfully" and "knowingly." So, therefore, it is only necessary for the jury to determine beyond a reasonable doubt that the defendant knowingly did not report for induction. As a matter of fact it is not even necessary to allege in the indictment that the act was wilfully done where the term is not a part of the statutory definition, and where the

facts alleged necessarily import wilfulness the word "wilfully" need not even be used therein.

Rumely v. United States, C. C. A. (2d) 1923, 293 Fed. 532; cert. den. 263 U. S. 713.

It is obvious that the allegation in the Indictment that the act was wilfully done is mere surplusage.

Title 50, United States Code, Section 311, does not require that the act shall be wilfully done.

POINT X.

The District Court Did Not Err in Refusing to Give to the Jury the Instruction Requested That Defendant Must Have Feloniously Failed to Report Before He Can Be Found Guilty.

Appellee respectfully adopts the arguments set forth under Point VIII which is equally applicable to this Instruction.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of conviction entered by the District Court should be affirmed.

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